FAX : 0532-2400149

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 13/06/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70555-70558/2017-EX[DB] dated 17/05/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/2349/2009	**HILITE INDUSTRIES PVT. LTD.** B-1, SITE-1, B.S. ROAD, IND. AREA, GHAZIABAD.
2	E/2350/2009	**SMT. SUDHA SHARMA, DIRECTOR OF** M/S HILITE IND. PVT. LTD. B-1, SITE-1, B.S.ROAD IND. AREA, GHAZIABAD.
3	E/2351/2009	**NEW DELHI MINIERALS & CHEMICALS** IIND FLOOR, SANJAY MOHALLA (OPPOSISTE YAD RAM PUBLIC SCHOOL), BHAJANPURA, DELHI AND 2/55, ROOP NAGAR, NEW DELHI.
4	E/2352/2009	**JSR INTERNATIONAL** D-154, IIND FLOOR, SANJAY MOHALLA, MAIN DISPENSARY ROAD, BHAJANPURA, DELHI.

Name and Address of
Respondent

5 -C.C.E. GHAZIABAD
C.G. O. Complex-II, Kamla
Nehru Nagar, Ghaziabad 201302

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6 -C.C.E. GHAZIABAD
C.G. O. Complex-II, Kamla
Nehru Nagar, Ghaziabad 201302

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7 -C.C.E. GHAZIABAD
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Nehru Nagar, Ghaziabad 201302

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8 -C.C.E. GHAZIABAD
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Other Appellants and Respondents as per Annexure

Copy To
9 Advocate(s) / Consultant(s):

V. LAKSHMI KUMARAN, ALD
3/1A/3 OPP AUTO SALES,ABOVE
THE OFFICE OF BLUE DART/DHL
COURIER, COLVIN ROAD, LOHIA
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10 Bar Association, CESTAT, Allahabad

11 Director Publications, Customs, Excise, I.P. Estate, Delhi

12 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi 3

13 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

14 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

15 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

16 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

17 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

18 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad-500082

19 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground;Near Karkardooma Court,Delhi-110032

20 C.D.R. 21 Office Copy 22 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/2349, 2350, 2351 & 2352/2009-EX[DB]

(Arising out of Order-in-Original No. 11/Commissioner/Ghaziabad/2009 dated 15/05/2009 passed by Commissioner of Central Excise & Customs Ghaziabad)

M/s Hilite Industries Pvt. Ltd.,

Smt. Sudha Sharma, Director of,

New Delhi Minerals & Chemicals &

JSR International **Appellant**

Vs.

Commissioner of Central Excise, Ghaziabad **Respondent**

Appearance:

Shri Atul Gupta, Advocate, for Appellant
Shri Rajeev Ranjan, Joint Commissioner (AR), for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing & Date of Decision : 17/05/2017

FINAL ORDER NO. 70555-70558/2017

Per: Anil G. Shakkarwar

The above stated four appeals are directed against common Order-in-Original No. 11/Commissioner/Ghaziabad/2009 dated 15/05/2009 passed by Commissioner of Central Excise & Customs Ghaziabad. Therefore, these appeals are taken together for decison.

2. The brief facts of the case are that M/s Hilite Industries Pvt. Ltd. (hereinafter referred as 'M/s Hilite') were engaged in the manufacture and clearing of two categories of CAF (Compressed Asbestos Fibre) Jointing Sheets falling under Chapter Heading No. 68.05 of the Schedule to Central Excise Tariff Act, 1985. M/s Hilite was availing SSI Exemption under Notification Nos. 5/1999-CE dated 28/02/1999, 6/2000-CE 01/03/2000, 3/2001-CE dated 01/03/2001 & 6/2002-CE dated 01/03/2002. Under said Notification No. 5/1999-CE dated 28/02/1999 the goods manufactured by M/s Hilite were covered by Serial No. 179. The said notification provided full exemption of Central Excise duty and the condition for eligibility for said notification was that the goods should contain not less than 25% by weight of Fly Ash or Phospho Gypsum or both. There was further condition that the manufacturer maintained proper accounts in such format and in such manner as the Commissioner of Central Excise having jurisdiction may specify in that behalf. A team of Central Excise Officers visited the manufacturing premises of M/s Hilite on 24/07/2003 and conducted investigations above the procurement of raw material and manufacturing process. On the basis of certain invoices of procurement of Fly Ash & Phospho Gypsum they came to know that the said invoices indicated that raw material was purchased from one supplier. Therefore, it appeared to Revenue that Fly Ash or Phospho Gypsum was not purchased and used by M/s Hilite

in the manufacture of their final product and therefore they were not eligible to avail the said SSI Exemption. Therefore, a Show Cause Notice dated 24/12/2004 was issued to M/s Hilite covering a period from December, 1999 to September, 2003. The appellant was called upon to show cause as to why duty amounting to Rs.95,24,695/- should not be demanded from them under provisions of erstwhile Rule 9(2) of erstwhile Central Excise Rules, 1944 read with Section 11A of Central Excise Act, 1944. Further, there was proposal for imposition of penalty under Rule 25 of Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944. Further, there was proposal to impose penalty under Rule 209A of the Central Excise Rules, 1944 read with Rule 26 of the Central Excise Rules, 2001/2002 on Late Shri A. B. Sharma, Smt. Sudha Sharma, M/s New Delhi Minerals & Chemicals & M/s JSR International. The said Show Cause Notice was decided through Order-in-Original No. 19/Commissioner/Ghaziabad/2007 passed by the Commissioner of Central Excise, Ghaziabad dated 29/03/2007 which was challenged before this Tribunal. This Tribunal decided through Final Order No. 454-458/2007-EX dated 09/08/2007 found that on 06/03/2007 three witnesses were cross examined by M/s Hilite and thereafter the said Order-in-Original dated 29/03/2007 was passed and no opportunity of personal hearing was granted therefore, this Tribunal found that the said Order-in-Original dated

29/03/2007 was passed in violation of principle of natural justice. Therefore, this Tribunal set aside the said Order-in-Original dated 29/03/2007 and remanded the matter back to the Adjudicating Authority to decide afresh after offering opportunity of personal hearing. In compliance to the said direction Original Authority passed Order-in-Original No. 11/Commissioner/Ghaziabad/2009 dated 15/05/2009 which is impugned order. Through the said impugned order dated 15/05/2009 Original Authority confirmed the said demand amounting to Rs.95,24,695/- against M/s Hilite and imposed equal amount of penalty on M/s Hilite. Further, the proceedings for imposition of penalty on Late Shri A. B. Sharma were dropped. Further penalty of Rs.8,00,000/- was imposed on Smt. Sudha Sharma under Rule 209A of the Central Excise Rules, 1944 read with Rule 26 of the Central Excise Rules, 2001/2002. Under the provisions of said Rules Original Authority also imposed penalty of Rs.5,00,000/- on each M/s New Delhi Minerals & Chemicals & M/s JSR International. Aggrieved by the said order M/s Hilite, Smt. Sudha Sharma, M/s New Delhi Minerals & Chemicals & M/s JSR International have preferred appeal before this Tribunal.

3. Heard the ld. Counsel for the appellants, who has submitted that on 24/07/2003 samples of the goods manufactured by the appellant were drawn and were sent to Departmental laboratory, CRCL. Further, on 22/09/2003

CRCL asked the Jurisdictional Superintendent to provide the composition of raw material. Further, on 06/10/2003 CRCL again asked the department to provide the sample of raw materials and the quantities of raw materials used in manufacture. On 13/10/2003 samples of raw materials such as Fly Ash & Phospho Gypsum were drawn by Jurisdictional Superintendent. He, further, stated that on 11/10/2004 CRCL returned the samples untested informing that it was not possible for the lab to determine the raw materials consumed. He, further, contented that the Jurisdictional Officer though took the samples of raw materials, but there is no evidence if the same was sent to CRCL as requested by CRCL in its earlier letter. He, further, stated that the samples were drawn again on 16/01/2006 from their factory and the said samples were also returned by CRCL stating that the percentage of Fly Ash could not be determined and the same may be verified by executive check through letter dated 21/06/2006. He, further, stated that on 16/08/2007 the Assistant Commissioner, Central Excise Division V, Ghaziabad observed that the appellant was correctly availing the benefit of the exemption notification and no contravention had been noticed. Further, the said Assistant Commissioner also intimated that the investigation initiated on 16/01/2006 was closed. On requested by the appellant cross examination of only one person was conducted on 06/03/2007. The appellant submitted request to the Original Authority on

07/03/2007 to cross examine the other three persons whose cross examination was denied. The ld. Counsel further has also submitted that they had submitted opinion given by Dr. Badri Prasad, Former Director, Revenue Laboratories Government of India, Ministry of Finance. The said opinion was issued on 17/09/2007 wherein Dr. Badri Prasad discussed chemical contents of Fly Ash & Phospho Gypsum appeared in the final product certified that the final product manufactured by M/s Hilite contain Fly Ash or Phospho Gypsum more than 25% by mass. He, further, stated that the Original Authority has dealt with the said opinion given by Dr. Badri Prasad, Former Director, Revenue Laboratories Government of India, Ministry of Finance. The said opinion issued on 17/09/2007 is stated in Para 4.22 of impugned Order-in-Original dated 15/05/2009 and it was held that the report of Dr. Badri Prasad to the extent that it contained presence of Phospho Gypsum more than 25% by weight being based on only assumption and need not be relied upon. He, further, contented that the said opinion given by Dr. Badri Prasad was not on the basis of assumption but it was based on the chemical analysis of Phospho Gypsum and that of the final product conducted by Sriram Institute of Industrial Research and test report dated 09/01/2004 & 27/08/2003 issued by said Sriram Institute of Industrial Research. He has further contended that the entire investigation and finding of Original Authority is circulated around the use of Phospho

Gypsum whereas the said exemption is admissible if Phospho Gypsum or Fly Ash or Phospho Gypsum + Fly Ash put together was used more than 25% by weight in the final product. He has further contented that in the entire investigation and adjudication there is no discussion about the use of Fly Ash. He contended that Dr. Badri Prasad, Former Director, Revenue Laboratories Government of India, Ministry of Finance has taken into consideration the contents of Fly Ash on that basis he analyze the content and given his opinion that the final product was containing more than 25% by mass Fly Ash or Phospho Gypsum. He, further, contented that the Original Authority was not expert in the Chemical Analysis and he should not have held that the said opinion dated 17/09/2009 given by Dr. Badri Prasad was only on assumption. The Original Authority should have sought opinion of CRCL on the opinion given by Dr. Badri Prasad.

4. Heard the ld. D. R. for Revenue, who supported the impugned Order-in-Original dated 15/05/2009.

5. Having considered the rival contentions and on perusal of the facts on record, we find that the said Notification 5/1999-CE dated 28/02/1999 entitles the manufacturer to clear goods at nil rate of duty if the said goods are containing more than 25% by weight of Fly Ash or Phospho Gypsum though the entire emphasis by Revenue was only on single commodity i.e. Phospho Gypsum and there was an attempt to

establish~~ment~~ that Phospho Gypsum was not used whereas there was no discussion on Fly Ash at all in the whole proceedings. Further, we find that Original Authority in Para 4.22 has held that opinion by Dr. Badri Prasad through letter dated 17/09/2007 was only an assumption which gives an impression that the Original Authority has tried to examine technical opinion without seeking any technical opinion from the competent wing of the Department i.e. CRCL. We are of the opinion that this matter needs to be remanded back to the Original Authority with a direction that the said Original Authority should refer said opinion dated 17/09/2007 given by Dr. Badri Prasad to CRCL and seek expert technical opinion about the correctness of opinion given by Dr. Badri Prasad and on the basis of such opinion by CRCL decide the matter in respect of presence of Fly Ash or Phospho Gypsum to be more than 25% by weight in the Fly Ash or Phospho Gypsum and as well as the eligibility of final product to the said Notification 5/1999-CE dated 28/02/1999. We also find that the penalty is imposed on M/s Hilite, Smt. Sudha Sharma, M/s New Delhi Minerals & Chemicals & M/s JSR International under Rule 209A of the Central Excise Rules, 1944 read with Rule 26 of the Central Excise Rules, 2001/2002 without confiscation of any goods. The said Rules provided that personal penalties are liable to be imposed on such persons who dealt with goods liable for confiscation. Therefore, we set aside the personal penalty imposed on Smt.

Sudha Sharma, M/s New Delhi Minerals & Chemicals & M/s JSR International and allow the appeals filed by Smt. Sudha Sharma, M/s New Delhi Minerals & Chemicals & M/s JSR International. In respect of appeal filed by M/s Hilite, we remand the matter back to the Original Authority as per the directions given hereinabove by setting aside the impugned Order-in-Original dated 15/05/2009. The appellant may produce a copy of this order within 30 day of receipt of the same to the office of the Original Authority. Further, Original Authority shall within another 30 days of such receipt of copy make a reference to CRCL, New Delhi. On receipt of opinion from CRCL, within 60 days serve the copy of the opinion of CRCL on the appellant and then decide the matter after giving opportunity of personal hearing. As a result, Appeal No. E/2349/2009 is remanded back to the Original Authority. Further Appeal Nos. E/2350/2009, E/2351/2009 & E/2352/2009 are allowed. In respect of appeals allowed the appellant shall be entitled for consequential relief, if any, in accordance with law.

(Dictated and pronounced in Court)

-Sd/-
(ANIL CHOUDHARY)
Member (JUDICIAL)

-Sd/-
(ANIL G. SHAKKARWAR)
Member(TECHNICAL)

Ansari

प्रमाणित प्रति/Certified True Copy
16/06/2017
सहायक पंजीकार/Asst. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
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